

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2021-114**

October 27, 2022

VIA ELECTRONIC MAIL ONLY

Mr. Tim Miller

RE: FOIA Appeal 2021-114

Dear Mr. Miller:

This letter is in response to the administrative appeals that you have submitted to the Mayor pursuant to the District of Columbia Freedom of Information Act ("FOIA"), D.C. Code §§ 2-531, *et seq.* In your appeal, you have challenged the response of the Metropolitan Police Department ("MPD") to your March 9, 2021 FOIA request, identified as 2021-BWC-00194, which sought the following:

Any body camera footage from MPD Incident CCN #20014846.

On March 9, 2021, MPD denied your request because a release of such footage would constitute as a clearly unwarranted invasion of personal privacy and is exempt from disclosure pursuant to D.C. Code § 2-534(a)(2) and (a)(3)(C).

In your March 10, 2021 appeal, you have asserted the release of the video would not constitute an invasion of personal privacy and segregable portions of the video should be provided.

Discussion

It is the public policy of the District of Columbia that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." In aid of that policy, FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." D.C. Code § 2-532(a). The right created under FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. D.C. Code § 2-534. Under FOIA, an agency is required to disclose materials only if they were "retained by a public body." D.C. Code § 2-502(18).

D.C. FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington*

Post Co. v. Minority Bus. Opportunity Comm'n, 560 A.2d 517, 521, n.5 (D.C. 1989).

D.C. Code § 2-534(a)(2) (“Exemption 2”) applies to “[i]nformation of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.” In determining whether disclosure of a record would constitute an invasion of personal privacy requires a balancing of the individual privacy interest against the public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989).

D.C. Code § 2-534(a)(3)(C) (“Exemption 3”) is more expansive than Exemption 2, and protects from public disclosure information contained in an investigatory file that “would constitute an unwarranted invasion of privacy.” Exemption 3 lacks the key word “clearly” that is contained in Exemption 2, and therefore is a broader privacy privilege.

In assessing MPD’s decision to withhold the requested information, the first part of the analysis is determining whether a sufficient privacy interest exists. *Id.* A privacy interest is cognizable under D.C. FOIA if it is substantial, which is anything greater than *de minimis*. *Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008). In general, there is a sufficient privacy interest in personal identifying information. *Skinner v. U.S. Dep’t. of Justice*, 806 F. Supp. 2d 105, 113 (D.D.C. 2011). Information such as names, personal phone numbers, and home addresses are considered to be personally identifiable information and are therefore exempt from disclosure. *See, e.g., Department of Defense v. FLRA*, 510 U.S. 487, 500 (1994). Moreover, the D.C. Circuit has held individuals have a “strong interest” in not being associated with unwarrantedly with alleged criminal activity whether they be suspects, witnesses, or investigators. *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (1990).

The second part of the analysis examines whether an individual privacy interest is outweighed by the public interest in disclosure. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 772- 773. In the context of D.C. FOIA, a record is deemed to be of “public interest” if it would shed light on an agency’s conduct. *Beck v. Department of Justice, et al.*, 997 F.2d 1489 (D.C. Cir. 1993). As the court held in *Beck*:

This statutory purpose is furthered by disclosure of official information that “sheds light on an agency’s performance of its statutory duties.” *Reporters Committee*, 489 U.S. at 773; *see also Ray*, 112 S. Ct. at 549. Information that “reveals little or nothing about an agency’s own conduct” does not further the statutory purpose; thus the public has no cognizable interest in the release of such information. *See Reporters Committee*, 489 U.S. at 773.

Id. at 1492-93.

Here, we find that there is a cognizable privacy interest because individuals have a substantial interest in not being associated with a police incident. In the absence of any explanation as to how the requested BWC footage would shed light on MPD’s conduct, MPD has properly withheld any response to the request. *See, e.g. Beck*, 997 F.2d at 1494 (When there is a privacy interest in a record and no countervailing public interest, the protected information may be

withheld from disclosure).

While you have asserted MPD has an obligation to segregate and release any non-exempt portions of the video, this is not feasible given the privacy interest of all persons depicted therein.

Conclusion

Based on the foregoing, we affirm MPD's decision and hereby dismiss your appeal. This constitutes the final decision of this Office with respect to your appeal. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia.

Respectfully,

Mayor's Office of Legal Counsel

cc: Brandy Reaves, MPD FOIA Officer (via email only)